DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 99-0423RST
Sales Tax
For Years 1996 and 1997

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ISSUE

I. Sales Tax – Liability of taxpayer to collect sales tax on delivery charges.

Authority: Ind. Code § 6-2.5-4-1; Ind. Code § 26-1-2-401
Ind. Admin. Code tit. 45, r. 2.2-4-3
Cowden & Sons Trucking, Inc. v. Indiana Department of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991).

Taxpayer protests the assessment for sales tax on delivery charges.

STATEMENT OF FACTS

Taxpayer, a retail merchant, is an Indiana corporation that owns two appliance stores in Indiana, and is engaged in the business of selling major home appliances such as washers, dryers, refrigerators, freezers, micro-waves, ranges, and televisions. Sometimes customers request delivery of the appliances they have purchased. The taxpayer charges a fee for this service and the charge is listed as a separate item on the sales receipt. The deliveries are often made using trucks owned by the taxpayer and those trucks are driven by employees of the taxpayer. At other times, delivery is made by independent private parties. When private parties are used to deliver the appliances, the taxpayer does not charge the customer a delivery fee; the fee is charged and collected by the private party.

A sales and use tax audit was completed on December 11, 1998, covering the years 1996 and 1997. The taxpayer protested the auditor's conclusion that the taxpayer should have collected sales tax on the amount charged to customers for delivery of appliances purchased by the customers. The taxpayer maintains that delivery is a service and, therefore, should not be subject to sales tax. Additionally, the taxpayer relies on Ind. Admin. Code tit. 45, r. 2.2-4-3(b)(3) which states that "[d]elivery charge[s] separately stated where no F.O.B. has been established [are] non taxable."

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DISCUSSION

The taxpayer maintains that delivery of goods is a service and, therefore, is exempt from sales tax. However, the selling at retail statute indicates that sales tax applies to the delivery charges made by the taxpayer. "[E]xcept as provided in subsection (g) [not applicable], any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, **delivery,** or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records" is part of the retail transaction and subject to sales tax. Ind. Code § 6-2.5-4-1(e)(2) (emphasis added). Although delivery is a service, it is not a tax exempt service under the circumstances of this case.

The taxpayer maintains that separately stated delivery charges where no F.O.B. has been established are non taxable. The taxpayer reaches this conclusion based upon Ind. Admin. Code tit. 45, r. 2.2-4-3(b)(3) which states, "[d]elivery charge[s] separately stated where no F.O.B. has been established [are] non taxable." However, as stated in subsection (a) of that regulation, "[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer." Ind. Admin. Code tit. 45, r. 2.2-4-3(a). In this instance, the taxpayer's delivery charges are separately stated on the sales receipts, delivery of the goods is made by or on behalf of the taxpayer, and title to the goods is not transferred to the buyer until delivery is completed. To accept the taxpayer's reading of the regulation would contradict subsection (a) of the regulation.

The application of sales tax to these delivery charges depends upon when title to the goods transferred to the buyer. The taxpayer, however, offered no evidence indicating that title to the goods passed to the buyer at any point prior to delivery of the goods. "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . ." Ind. Code § 26-1-2-401(2). The Tax Court has held that "services performed prior to a transfer of property indicate an inextricable transaction wholly subject to sales tax . . ." Cowden & Sons v. Indiana Department of State Revenue, 575 N.E.2d 718, 722 (Ind. Tax Ct. 1991).

The taxpayer erroneously relies on only one part of a regulation and ignores the statutory language of Ind. Code § 6-2.5-4-1(e)(2). As the delivery charges made by the taxpayer were separately stated on the receipts and delivery was performed prior to transfer of title to the buyer, the Department finds that the delivery charges are part of the retail transaction and are, therefore, subject to sales tax.

FINDING

The taxpayer's protest is denied.